

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of Rules and  
Regulations Implementing the  
Telephone Consumer Protection  
Act of 1991

CG Docket No. 02-278

**COMMENTS OF ROBERT BIGGERSTAFF OPPOSING THE PETITIONS FOR  
RECONSIDERATION OF PACE, MARKETLINK, AND SATCOM.**

**Introduction**

By these petitions, petitioners ask the Commission to reverse the salutary benefits of existing rules. The Commission should deny all three petitions in their entirety.

**Automated opt-out message for abandoned calls**

The Commission rightly adopted a requirement for an automated opt-out message so a consumer can stop future unwanted calls. All three petitioners, led by PACE, object to that requirement being applied to telemarketing calls that are “abandoned” arguing that such a provision was not set out in the NPRM.<sup>1</sup>

Petitioners are wrong. The Commission expressly noted that it was considering such a requirement for “telemarketing messages” and a call made for telemarketing purposes that results in an abandon, is a “telemarketing message.” Indeed the Commission has provided consistent guidance for years that a call made for telemarketing *purposes* is a telephone solicitation, even if no solicitation is actually made.

Furthermore the Commission had an ample record to justify such a rule. Not only is this

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<sup>1</sup> Notice of Proposed Rulemaking (“NPRM”) in this docket, adopted January 20, 2010 (FCC 10-18).

docket replete with consumer comments on such messages, the degree of disgust with unwanted telephone calls—and in particular dead-air abandoned calls—amply demonstrates the need for such a rule.

**A predictive dialer is an ATDS.**

The Commission's current construction of ATDS squarely fits gravamen of the original target of this portion of the TCPA—automated devices that make calls without meaningful human intervention required to dial each individual call. That is still a good—and practical—application of the Commission's interpretive authority. This provision of the TCPA regarding autodialed and prerecorded calls to cell phones applies to ALL calls to cell phones including political calls—not just telemarketing calls.<sup>2</sup> That is the way Congress wrote it and intended it. Petitioners (and others) demonstrate either considerable chutzpah or ignorance when they implore the Commission to exempt their calls from the autodialer or robocall restrictions of the TCPA because they are not “telemarketing” calls.

Recently the Seventh Circuit Court of Appeals issued its unanimous decision in *Soppet v. Enhanced Recovery Co., LLC*, --- F.3d ---, 2012 TCPA Rep. 2297, 2012 WL 1650485 (7th Cir. May 11, 2012). In that opinion, Judge Easterbrook noted:

[P]redictive dialers lack human intelligence and, like the buckets enchanted by the Sorcerer's Apprentice, continue until stopped by their true master.

In this manner, Judge Easterbrook and the unanimous panel of the Seventh Circuit correctly recognize that modern computer-interfaced dialers (including those that send text messages to cell phones without human intervention on each call) are the equivalent in capacity—and injury—to the autodialers that Senator Hollings identified as telephone terrorism when

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<sup>2</sup> See *FCC Enforcement Advisory*, DA 12-1476 (Sep. 11, 2012).

introducing the TCPA in 1991.<sup>3</sup>

The *Soppet* court went on to describe multiple options available to those using predictive dialers so they can be employed in compliance with the TCPA. Vendors also offer TCPA-compliant predictive dialing solutions.<sup>4</sup> There is simply no occasion to walk back the Commission's long-established holding that predictive dialers are an "automatic telephone dialing system" under the TCPA.

In the early days of dialers, 8 inch floppy disks holding lists of phone numbers stored about 200Kb of information, or 20,000 phone numbers. That provided a practical limit on their dialing capacity. Dialers that generated phone numbers rather than loading them from a floppy had the ability to dial for days on end without stopping for new lists of numbers. That capacity to run autonomously or unattended by any meaningful human interaction, was the evil sought to be addressed.

As comments on this docket over the years have repeatedly stated, Congress clearly was aware of, and intended, the definition of "automatic telephone dialing system" to be broad, and explicitly intended that it would apply to any device that acquires such capability if the device can be "used in conjunction with other equipment:"

It should be noted that the bill's definition of an "automatic telephone dialing system" is broad, not only including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the "capability" to be used in such manner. The Committee is aware of concerns that this broad definition could cover the mere ownership of

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<sup>3</sup> See also, *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, 2002 TCPA Rep. 1045 (Ohio App. 2002) (autodialer system was "apparently was not working properly" and made "numerous" calls to the same consumer).

<sup>4</sup> See, e.g., *New Radius Cell Manager Strictly Follows TCPA Law*, available at <<http://www.insidearm.com/daily/collection-laws-regulations/collection-laws-and-regulations/new-radius-cell-manager-strictly-follows-tcpa-law/>>.

office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages.

H.R. Rep. No. 633, 101st Cong., 2nd Sess. (1990).

Today, the entire list of every phone number in North America can fit on a single flash drive and be loaded into a dialer. This makes modern computer-interfaced dialers (including those that send text messages to cell phones without human intervention on each call) the equivalent in capacity—and injury—to the autodialers that Senator Hollings identified as telephone terrorism when introducing the TCPA in 1991. The Commission was correct in declaring computer devices that dial numbers from a list (including those sending text messages), as falling within the ambit of the TCPA.

If the Commission’s interpretation of ATDS is weakened, telemarketers and text-message spammers will quickly develop purpose-built systems to evade any limited definition of ATDS. While a test that imposes a “human intervention” requirement so that human intervention is required to direct a dialing device to dial each individual phone number may seem at first glance effective, developments in spam and astroturfing on the Internet have shown that large cadres of live persons are available in places like India for marketers to use to do repetitive computer tasks such as clicking on a button to get past systems intended to prevent automated systems from sending spam messages.<sup>5,6</sup> These same “human robots” can be tasked with clicking on a button

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<sup>5</sup> See, e.g., Dancho Danchev, *Inside India’s CAPTCHA solving economy*. ZDNet, <http://www.zdnet.com/blog/security/inside-indias-captcha-solving-economy/1835> (last visited Aug. 27, 2012).

<sup>6</sup> “The spambots use ready-made tools from ‘Captcha Relay Service Providers’ (‘Captcha Farms’) to relay the image to human image-solvers from developing countries. These are paid as low a cent to solve 20 captchas, working from home.” *With Old-Guard Captcha Solutions Rendered Ineffective by ‘Captcha Farms’, CAPTCHA2.0 is Now Available From SiteBlackBox*, <http://www.techbriefing.net/modules.php?op=modload&name=News&file=article&sid=153715> (last visited Aug. 27, 2012).

200 times a minute to make ATDS solicitations to cell phones or send spam text solicitations, and thus satisfying a “human intervention” requirement for each individual message.

Nor is a requirement for an automated opt-out for abandoned calls an unreasonable burden. We must not lose sight of the fact these are dial-and-hang-up nuisance calls being *knowingly* inflicted upon millions of consumers. The only reason they exist is because some company’s profits are more important to them than a consumer’s time. To quote the Commission’s earlier order “consumers are often frightened by dead-air and hang-up calls generated by predictive dialers believing they are being stalked.”<sup>7</sup> It seems to be lost on petitioners that abandoned calls made for telemarketing purposes *are illegal* under the TCPA. The “safe harbor” adopted by the Commission applies only to FCC enforcement. It does not change the fact that such calls are actionable by state attorneys general and private consumers.

**The definition of "Prior Express Written Consent" is not unduly burdensome**

PACE contends that the definition adopted by the Commission for prerecord/autodialer calls to cell phones is "unduly burdensome" because it requires that for such consent to be valid, the consumer must be affirmatively told that an ATDS will be used if they want to obtain permission for using a ATDS to call a cell phone.... and they believe consumers will misunderstand, and erroneously believe that an ATDS call is a robocall. This would be funny if it was not so sad. The law requires express consent. Any first-year law student will tell you that for consent to be express, and meaningful, you must “set forth in words” exactly what the consumer is consenting to. Petitioners apparently just don’t want to be honest with consumers.

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<sup>7</sup> 2003 Report & Order, ¶19, citing comments.

They want to avoid terms which consumers have a negative reaction to.<sup>8</sup> Sometimes, the truth hurts, and if telling the consumer the truth hurts your business model, then perhaps you ought to change models.

### **Written permission for sales calls to cell phones is appropriate**

A close reading of SatCom's petition reveals that it seems to generate revenue from telemarketing its cellular customers. The Commission has decided, on an ample record, that sales calls to cell phones must have written permission. SatCom's objection seems to lie in the crimp in its business model and not in logic. To the extent that the rules are inconsistent with the Commission's Robocall Order, of course that inconsistency should be clarified that written permission is required for a) telemarketing robocalls to land lines; all robocalls and ATDS calls to cell phones. The difference is that predictive dialer (ATDS) calls to residential land lines do not require written consent, while such calls to cell phones do.

### **CONCLUSION**

At one time in the course of history, travel outside the city walls was fraught with highwaymen and peril. But expansion of commerce, and the elevation of the standard of living for all, demanded travel and trade. The presence of rigorous law enforcement was a crucial element in that expansion because it made trade possible by making travel safer.

Cell phones, text messaging, and the ubiquity of other modern communications technologies have the capacity to expand and enhance our lives. Yet the digital highwaymen are making consumers cautious—and for good reason. I recently read that marketers consider the

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<sup>8</sup> Lest anyone forget, PACE is the newly-minted name for the group that previously called itself the "American **Telemarketing** Association." It is hard to find anyone who admits publically to actually engaging in telemarketing. This was captured over a decade ago by Jay Leno: "Bin Laden most hated in America, Telemarketers drop to number two." Jay Leno's headline segment, Oct. 29, 2001.

proliferation of data about consumers to be the “new oil.”<sup>9</sup> Protect us from exploitation of our personal data that is considered simply a “raw material” by others.

I am among many people who are reluctant to share a cell phone number or e-mail address with any business because of the risk of it being abused. Like the law enforcement programs of the past that enabled greater trade and its attendant benefits, more rigorous protections of our newest communications mediums will actually encourage more consumers to share the contact information that businesses want us to share. Give consumers greater protection from the digital highwaymen and we will be free to use that highway to its fullest benefit.

Respectfully submitted, this the 18th day of October, 2012.

*/s/ Robert Biggerstaff*

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<sup>9</sup> *Is Data The New Oil?*, Forbes, <<http://www.forbes.com/sites/perryrotella/2012/04/02/is-data-the-new-oil/>> (last visited Oct. 18, 2012).